In the Supreme Court

OF THE

United States

OCTOBER TERM, 1934

No.

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HILDEGARD SCHOENAMSGRUBER, by Gustav Schoenamsgruber, her guardian,

Petitioner,

vs.

THE HAMBURG AMERICAN LINE (a corporation), Claimant of the Motorship "The Oakland", her engines, etc.,

Respondent,

and

GUSTAV SCHOENAMSGRUBER,

Petitioner,

vs.

THE HAMBURG AMERICAN LINE (a corporation), Claimant of the Motorship "The Oakland", her engines, etc.,

Respondent.

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BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Ninth Circuit.

J. HAMPTON HOGE,
California Commercial Union Building, San Francisco, California,
S. HASKET DERBY,
Merchants Exchange Building, San Francisco, California,
Proctors for Respondent.

DERBY, SHARP, QUINBY & TWEEDT,
Merchants Exchange Building, San Francisco, California,
Of Counsel.

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Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Ninth Circuit.

STATEMENT OF THE CASE.

A purely procedural point is all that is involved herein. The court below refused to discuss the merits of the appeal, but dismissed the appeal as premature. Any rights that petitioners wish to assert can be asserted after a final decree is entered herein.

Petitioners filed two libels in admiralty in the district court based on an alleged breach of contract to carry certain passengers safely from Germany to San Francisco. Said contract contained a clause requiring the parties to refer to arbitration any claims for damages or alleged breach of contract. Pursuant to the provision in said contract and pursuant to The United States Arbitration Act (9 U. S. Code, §8) the district court entered an order staying further proceedings before it and directing the parties to proceed to arbitration as required by their contract. The order of the district court expressly retained jurisdiction in the libel proceedings to enter a final decree in the case after the arbitrator should report his findings.

Petitioners refused to abide by said order and no hearing has been had before any arbitrator and no arbitration proceedings have been had. No final order nor decree has been made or entered by the district court, nor has any interlocutory decree determining the rights or liabilities of the parties been made or entered in the court below.

Notwithstanding, petitioners have appealed to the Circuit Court of Appeals for the Ninth Circuit, contending that the arbitration agreement in the contract sued upon was not binding upon the petitioners.

The Circuit Court of Appeals, however, refused to consider the merits of the question as to the enforceability of the arbitration agreement, deeming the appeal premature. It entered an order dismissing the appeal.

Petitioners here argue that the order of reference to the arbitrators was "final", and entitled them on appeal from the order to argue the merits of the validity of the arbitration agreement.

We reply by showing it to be the universal rule that an order is not final or appealable which refers a matter to a commissioner, master or referee, where the court making the reference retains jurisdiction to enter its own final decree or judgment. We state further, that while the question of the validity of the arbitration agreement is not before the court, the fact of such validity is well settled by the authorities.

APPEAL FROM AN ORDER OF REFERENCE IS PREMATURE; THE POINTS OF APPEAL SHOULD BE RAISED BY APPEAL FROM THE FINAL DECREE.

This court will dismiss an appeal where no final judgment has been entered. As stated in

> *Nyanza Steamship Co. v. Jahncke Drydock No. 1,* 264 U. S. 439, 440, 68 L. Ed. 777, 778:
>
> "The judgment must be not only in its nature final, but **a complete disposition of the cause** • • •. This rule is applicable to appeals in admiralty." (Emphasis by brief writers.)

No appeal may be had in admiralty except from a final order.

28 *U. S. Code,* §§225-227;

1 *Corpus Juris* 1345;

France & Canada S. S. Co. v. French Republic, 285 Fed. 290, 292-4;

1 *Benedict on Admiralty,* §533.

The order appealed from is not affected by the 1926 Act, 28 U. S. Code, §227, allowing appeals from certain interlocutory decrees "determining the rights and liabilities of the parties". That amendment covers only

> "an interlocutory decree in admiralty determining the rights and liabilities of the parties".

The order here involved is simply one of reference and makes no attempt to decree any rights or liabilities of the parties.

A final decision is one which determines "the rights or liabilities of the parties".

Cox v. Graves, 55 F. (2d) 217-218;

Gardner v. Grand Beach Co., 29 F. (2d) 481, 482.

The rule is stated in

1 *Corpus Juris* 1346,

as follows:

> "The rule for determining whether, for the purposes of an appeal, a decree is final, is, in brief, whether the decree disposes of the entire controversy between the parties. If it does not dispose of the whole case on its merits, it is not final".

The order directing the parties to proceed to arbitration does not determine any rights or liabilities of the

parties, but merely directs that those rights and liabilities be ascertained by arbitration.

As stated by Judge Wilbur in

Waialua Agr. Co. v. Christian, 52 F. (2d) 847,

the order

"is not final because it expressly directs further proceedings".

Where a case is referred to a commissioner to take testimony and report the order of the court

"cannot be regarded as final for the purposes of an appeal".

Deslions v. La Compagnie Generale Transatlantique, 210 U. S. 95, 52 L. Ed. 973.

Where an attempt is made to appeal from an order which is not final, the Circuit Court of Appeals is required to dismiss the appeal and leave the parties to protect their right by appeal from the final decree.

Arnold v. United States, 263 U. S. 427, 434, 68 L. Ed. 371;

Waialua Agr. Co. v. Christian (IX C. C. A. 1931), 52 F. (2d) 847;

Cox v. Graves, 55 F. (2d) 217-218;

France & Canada S. S. Co. v. French Republic, 285 Fed. 290, 292-4.

The Circuit Court of Appeals was required to dismiss the appeal as no judgment or decree could be entered in the original libel proceeding until after the arbitration be had; and an appeal from such judgment or decree can raise any objections to the validity of this arbitration agreement.

THE CASES CITED BY PETITIONERS DO NOT SUPPORT THEIR CONTENTION AS TO THE APPEALABILITY OF AN ORDER DIRECTING THE PARTIES TO PROCEED TO ARBITRATION.

In order to create an apparent conflict between the decision of the Circuit Court of Appeals for the ninth circuit holding that the order directing the parties to proceed to arbitration is not appealable, and other Circuit Courts of Appeal, petitioners state that the following cases are all to the contrary:

Krauss Bros. v. Bossert & Sons, 62 F. (2d) 1004;

California Prune & Apricot Growers Ass'n v. Catz American Co., 60 F. (2d) 788;

Marchant v. Mead Mfg. Co., 252 N. Y. 284, 169 N. E. 386;

Hosiery Mfg. Co. v. Goldston, 238 N. Y. 22, 143 N. E. 779.

Every one of these cases was relied upon by petitioners below, discussed in the briefs and fully considered by the court below.

A short comment on these cases will show that they do not support petitioners' contention.

The case of

Krauss Bros. v. Bossert & Sons, 62 F. (2d) 1004,

involves an appeal from a decree requiring arbitration. The opinion in the case does not set forth any authorities, but an examination of the record and briefs in the case shows the following facts, which were set forth by us in our brief to the court below and not contradicted by petitioners:

1. Both parties treated the order as final and apparently desired the appeal to be heard. The fact

that the court of its own initiative discussed the point indicates it doubted the appealability of the order.

2. No motion to dismiss the appeal was made.

3. No mention is made in any of the briefs as to whether or not the order was appealable.

4. No authorities on the question of the appealability of the order are referred to in any of the briefs, or even in the court's opinion.

5. That case was a special proceeding under section 4 of the Arbitration Act, whereas our case is an ordinary admiralty libel in which the request for an order for arbitration was made under section 8 of the Arbitration Act.

The decision in

Utility Oil Co., 69 F. (2d) 524,

was from an order *denying* arbitration. The opinion in that case does not discuss the finality or appealability of orders denying arbitration. Moreover, there is an important difference between granting and denying arbitration.

There is a plain analogy to rulings on demurrers. Where a general demurrer is sustained, there is a basis for appeal without a trial. Where the demurrer is overruled, the case must be tried before the ruling on the demurrer can be appealed. This distinction is suggested by the court in

The Maria, 67 F. (2d) 571,

holding non-appealable an interlocutory decree in admiralty overruling exceptions and denying a motion to dismiss the libel. The court says:

"It is clear that here not all of the 'merits' have yet been decided, by which we mean those issues on which liability, as distinguished from its amount, may depend finally.

"Whenever a demurrer is overruled, a successful appeal will terminate the suit, unless the pleading be amended.

"The reason for denying the appeal, when the case is in that posture, is that, if the decision prove to be right, a second appeal may be necessary."

* * * * * * *

" 'The rights and liabilities of the parties' are therefore fixed only on the hypothesis that the ruling was wrong, and that cannot be ascertained while the appeal is pending. Thus the question must be begged on which the existence of our jurisdiction turns".

The *Catz American* case was a decision in the 9th Circuit by the same court whose order is appealed from here. In its opinion below herein the court points out that in its earlier decision there was involved an appeal from an order directing arbitration under the State Act. The court points out that the state law provides for a special and summary proceeding to procure an order for arbitration and that an order under such a statute has been held to be final by the court of appeals of the State of New York in two New York cases, which are the ones above mentioned. The court below then distinguishes the two New York cases by pointing out that the order for arbitration here was "made in the course of litigation inaugurated by the libellant under the general law", and was not a special proceeding to procure an order for arbitration.

In the case of

Hosiery Mfg. Co. v. Goldston, 238 N. Y. 22, 143 N. E. 779,

Judge Pound is careful to point out that the New York Act makes the obtaining of an arbitration order "the end of one special proceeding". Being "the end" of a special proceeding under New York practice, it may well be deemed final, as it is the final order of the separate special proceeding which, as Judge Cardozo points out in the other case, is "not a part of the arbitration".

In the present case the order was not "the end" of any special proceeding, but only one of the steps toward the obtaining of a final judgment.

The case of

Marchant v. Mead Mfg. Co., 252 N. Y. 284, 169 N. E. 386,

is not an appeal from an order directing arbitration, but is an appeal from the judgment entered on the award of the arbitrators. That is precisely the remedy open in this case. Petitioners can appeal from the judgment when it is entered on the award of the arbitrators, if at that time they are so advised.

THE MERITS OF THE PROCEDURAL POINT.

The same logic which would permit an appeal from the interlocutory order in this case, would permit an appeal from every other step in the case. When a demurrer is overruled, counsel could with the same logic argue that an appeal might make unnecessary a trial of the facts; so likewise when a case is referred to a special master, or

a commissioner in admiralty, or when exceptions are overruled to a libel. As stated in petitioners' brief in the court below:

> "To permit litigant to appeal at every step in the litigation from every adverse ruling would sanction piecemeal litigation and be productive of a multiplicity of suits. The rule is therefore that the cause must be fully disposed of".

This case will not be "fully disposed of" until the trial court enters a judgment upon the arbitration award as contemplated by section 8 of The United States Arbitration Act.

Analogy may be made to decrees in admiralty referring cases to commissioners to take testimony (where, as here, such decrees are not affected by the 1926 Act, 28 U. S. Code, §227, allowing appeals from certain interlocutory decrees "determining the rights and liabilities of the parties"). Such a decree

> "cannot be regarded as final for the purposes of an appeal".
>
> *Deslions v. La Compagnie Generale Transatlantique,* 210 U. S. 95, 52 L. Ed. 973.

As stated in

1 *Corpus Juris* 1346, §297:

> "The rule for determining whether, for the purposes of an appeal, a decree is final, is, in brief, whether the decree disposes of the entire controversy between the parties. If it does not dispose of the whole case on its merits, it is not final".

THE ARBITRATION AGREEMENT IS VALID AND ENFORCEABLE.

Petitioners' argument as to the invalidity of the arbitration clause is not relevant on this appeal, and on its merits is plainly answered by the express terms of the United States Arbitration Act.

Before the passage of The United States Arbitration Act in 1926, many courts refused to enforce arbitration agreements upon the alleged public policy that courts should not be ousted of their jurisdiction by the mere agreement of the parties.

Typical of such obsolete cases are those now cited by petitioners (without calling attention to the fact that policy purported to be expressed in those cases has since been reversed by Congress and the courts and condemned a "an anachronism").

These are:

Guaranty etc. Co. v. Green etc. Co., 139 U. S. 137, 35 L. Ed. 116;

Potomac etc. Co. v. Baker Salvage Co., 123 U. S. 40, 31 L. Ed. 75.

The first case was decided in 1890 (and has no reference to arbitration at all). The other was decided in 1887.

Decisions denying force to arbitration clauses as allegedly "ousting the jurisdiction of the courts" provoked quite a public outcry. Business organizations protested so vigorously that Congress made a special investigation resulting in The United States Arbitration Act of 1926, which repudiates the alleged public policy set out in these old cases cited by appellants.

This is discussed by the court in

The Silverbrook, 18 F. (2d) 144, 146,

which quoted that part of the Congressional report declaring

> "The need for the law arises from an anachronism of our American law".

As recently stated by Mr. Justice Martin in

> *In re Utility Oil Corp.*, 69 F. (2d) 524, 526:
>
> "The United States Arbitration Act * * * was intended * * * to change this view * * * It is quite apparent that Congress intended * * * to validate arbitration agreements as affirmative defenses in admiralty".

Even before the passage of the Arbitration Act, the United States Supreme Court stated in

> *Red Cross Line v. Atlantic Fruit Co.*, 264 U. S. 109, 68 L. Ed. 582, 585:
>
> "In admiralty also, agreements to submit controversies to arbitration are valid. Reference of maritime controversies to arbitration has long been common practice."

In that case was upheld the validity of the Arbitration Law of New York.

The validity of arbitration clauses (entered into since February 12, 1925) has been upheld under the Act by the United States Supreme Court in

> *Marine Transit Co. v. Dreyfuss*, 284 U. S. 263, 76 L. Ed. 282.

This is in accord with the public policy set out in the Act of 1925 (9 U. S. Code, §2), which provides that

> "A written provision in any maritime transaction or contract * * * to settle by arbitration a controversy * * * shall be valid, irrevocable and enforceable."

THE THURSTON CASE.

The only case cited under this heading by petitioners which was decided since the enactment of The United States Arbitration Act is

In re Thurston, 48 F. (2d) 578.

There was involved no arbitration agreement at all; no controversy was presented for decision. In that case an insurance policy provided for a surveyor, to specify what work was necessary to make a damaged vessel whole. The court very properly held the parties

> "did not stipulate for arbitration under this act • • • here the parties did not bring their dispute within either section 8 or section 9 of the act".

In our case section 8 is expressly applicable. For there is before the district court a pending libel in admiralty, and in the admiralty proceeding, a motion for arbitration was made. There is, therefore, applicable the plain terms of section 8 declaring that

> "If the basis of jurisdiction be a cause of action otherwise justiciable in admiralty, • • • the court shall then have jurisdiction to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award".

CONCLUSION.

All that the court below did was to hold that the appeal was premature. It did not pass upon the merits at all. The only issue involved was as to whether or not an appeal may be had before trial from a decree staying the proceedings and directing the parties to carry out the agreement to arbitrate. To permit an appeal in such an

instance would invalidate a whole host of cases holding that where an order refers matters to commissioners, referees or special masters and the like, the order is not final and cannot be appealed from until after the final decree is entered.

Under the circumstances, the United States Circuit Court of Appeals was required to dismiss the appeals before it and leave the parties free to protect their rights on appeal from the final order. This was the practice followed in the case of

Marine Transit Corp. v. Dreyfuss, 284 U. S. 263, 76 L. Ed. 282,

and is the practice which petitioners in this case should follow.

The order of reference in this case certainly cannot be deemed "a complete disposition of the cause" so as to constitute a "final" judgment from which an appeal may be had as said by this court in

Nyanza Steamship Co. v. Jahncke Drydock No. 1, 264 U. S. 439, 440, 68 L. Ed. 777, 778.

Petition for a writ of certiorari should be denied.

Dated, San Francisco, California,
October 5, 1934.

Respectfully submitted,
J. HAMPTON HOGE,
S. HASKET DERBY,
Proctors for Respondent.

DERBY, SHARP, QUINBY & TWEEDT,
Of Counsel.